INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	4
Specifications of error to be urged	17
Reasons for granting the writ	18
Conclusion	27

CITATIONS

Cases:

Baker v. *United States*, 115 F. (2d) 533, certiorari denied, 312 U. S. 692	22
Barnard v. *United States*, 16 F. (2d) 451, certiorari denied, 274 U. S. 736	21
Cantwell v. *Connecticut*, 310 U. S. 296	20
Cooper v. *Schlesinger*, 111 U. S. 148	22
Fournier v. *United States*, 58 F. (2d) 3, certiorari denied, 286 U. S. 565	23
Glover v. *United States*, 125 F. (2d) 291, certiorari denied, 316 U. S. 690	24
John Hancock Ins. Co. v. *Bartels*, 308 U. S. 180	25
Johnson v. *United States*, 318 U. S. 189	19
Knickerbocker Merchandising Co. v. *United States*, 13 F. (2d) 544, certiorari denied, 273 U. S. 729	21
Landay v. *United States*, 108 F. (2d) 698, certiorari denied, 309 U. S. 681	23
Landis v. *North American Co.*, 299 U. S. 248	25
Leche v. *United States*, 118 F. (2d) 246, certiorari denied, 314 U. S. 617	24
Levine v. *United States*, 79 F. (2d) 364	22
Lewis v. *United States*, 38 F. (2d) 406	22
Palmer v. *Hoffman*, 318 U. S. 109	19
Pierce v. *United States*, 252 U. S. 239	22
School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94	20, 26
Seven Cases v. *United States*, 239 U. S. 510	21
Shreve v. *United States*, 103 F. (2d) 796, certiorari denied, 308 U. S. 570	22
Shushan v. *United States*, 117 F. (2d) 110, certiorari denied, 313 U. S. 574	23
Simons v. *United States*, 119 F. (2d) 539, certiorari denied, 314 U. S. 616	22

Cases—Continued.
Stephens v. *United States*, 41 F. (2d) 440, certiorari denied *sub nom. Spicer* v. *United States*, 282 U. S. 880
United States v. *Buckner*, 108 F. (2d) 921, certiorari denied, 309 U. S. 669
United States v. *Comyns*, 248 U. S. 349
United States v. *Dilliard*, 101 F. (2d) 829, certiorari denied, 286 U. S. 565
United States v. *Groves*, 122 F. (2d) 87, certiorari denied, 314 U. S. 670
Watson v. *Jones*, 80 U. S. 679
Statute:
Mail Fraud Statute (Section 215 of the Criminal Code, 18 U. S. C. 338)

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 472

THE UNITED STATES OF AMERICA, PETITIONER

v.

EDNA W. BALLARD AND DONALD BALLARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General on behalf of the United States prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered June 21, 1943 (R. 1632) reversing the convictions of Edna W. Ballard and Donald Ballard for using the mails to defraud and for conspiring to so use the mails.

OPINION BELOW

The opinion of the circuit court of appeals (R. 1625–1631 appears at 136 F. (2d) 829. The opinion of Judge Denman concurring in the denial of the petition for rehearing (R. 1633–1634) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 21, 1943 (R. 1632). Petition for rehearing was denied on September 29, 1943 R. (1633). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

In a trial for use of the mails to defraud by the propagation of a purported religious movement, the trial judge stated to the jury that the truth or falsity of the representations or beliefs was not in issue, and that the defendants should be acquitted if they honestly and in good faith believed what they wrote and said, and convicted if they did not so believe but used the mails to obtain money. The statement was given with the approval of defense counsel, was relied on by them, and quoted in their summation, as a favorable view of their case.

1. May reversal of a conviction be predicated on a statement of the trial judge given in the circumstances described?

2. In any event, may false representations be established under the mail-fraud statute by proving the falsity of defendants' professions of belief?

3. Is it sufficient under the mail-fraud statute to prove a scheme to defraud by abuse of a position of trust or confidence?

STATUTE INVOLVED

The mail fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than

$1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment in twelve counts charging use of the mails to defraud and conspiracy to so use the mails was returned in the United States District Court for the Southern District of California against Edna W. Ballard, her son Donald Ballard, and others. The scheme to defraud set forth in the indictment charged that the defendants and Guy W. Ballard (who died before the indictment was returned) organized a purported religious organization known as the "I Am" movement, and in connection therewith formed and dominated two corporations known as the St. Germain Foundation and the St. Germain Press, established branch offices and meeting rooms in various cities, and arranged a number of radio programs; that as a means of inducing their followers to purchase books, charts, pamphlets, etc., and to make donations to defendants and the organizations controlled by them, defendants made a number of false representations. Among the misrepresentations listed in the indictment were claims that Guy W. Ballard had attained a supernatural state of immortality; that all the Ballards had been selected as divine messengers through whom the teachings of St. Germain and other "ascended masters" would be communicated to mankind; that the Ballards had the power to

conquer disease, death, old age, poverty, and misery; that they could cure and had cured persons of physical ailments; that they had the power to precipitate from the air money and other material riches; that they had received divine visitations from St. Germain and other supernatural entities who dictated the books published by defendants; that St. Germain had appeared in person before Charles Sindelar who had painted the saint's portrait; that books, charts, and phonograph records issued by defendants had special salutary qualities which would be transmitted to purchasers; that since a cataclysm was about to engulf the earth it was wiser to give money to defendants than to invest it in banks, homes, insurance, etc. (R. 2–22.)

The evidence for the Government may be summarized as follows:

In 1930, at Mt. Shasta, California, Guy W. Ballard wrote a book called "Unveiled Mysteries" which purported to be his true experiences (R. 257, 417, 507, 614, 757–758). It was first published and offered for sale in 1934 (R. 242). For approximately two years before that time, Guy W. Ballard and his wife, Edna Ballard, had been conducting classes in Chicago at which they read portions of the manuscript of "Unveiled Mysteries" and a second book called "The Magic Presence" (R. 242, 427–430, 475, 553). In the fall of 1934 the Ballards engaged

Harry Sieber to act as their business manager and agreed to give him a percentage of the amount received from the sale of the books (R. 271, 274, 285–287, 291). Arrangements were made to have the Ballards conduct classes in various cities at which the disciples would understand that "love gifts" to the "messengers" would be acceptable, the proceeds of such gifts to be divided equally between the Ballards and Sieber (R. 273–274, 278–279, 291). The tour was a financial success, each class resulting in gifts totaling approximately $1,000 (R. 295–296).

Thereafter, the "I Am" movement grew rapidly. Disciples were appointed "messengers" and given authority to conduct classes and reading rooms in various cities (R. 431–433, 435–437, 487–489, 755, 765–766). The local groups operated independently but purchased books, charts, records, etc., from the St. Germain Press (R. 436, 584, 615, 755–756, 762–766). The Ballards themselves conducted a number of classes in various cities at which autographed books were sold and substantial love offerings received (R. 561–562, 616, 632, 767). By 1940 the publications consisted of seven books and a magazine called "The Voice of the I Am" (R. 234, 241–242, 553). Each student was urged to buy his own set of books and to refrain from lending his copies to others as the radiation of another person would lessen the beneficent effect (R. 400, 510, 614–615). The radio was used extensively, approximately $190,000

being spent for radio advertising (R. 253–254, 645–646). Records for radio transcriptions were sold to the local groups, who assumed responsibility for the sponsoring of broadcasts (R. 437, 448–449, 646–647, 654–655, 666–668, 679, 684, 759). Phonograph records, advertised as having a special healing quality because of their blue color, and a painting, represented as the perfect likeness of St. Germain as he appeared to the Ballards and to the artist, Sindelar, were offered for sale (R. 349, 352, 354, 590, 644, 647). The Ballards engaged in extensive correspondence with persons throughout the country, receiving between 25 and 50 letters a day (R. 538). About one-fourth of the letters enclosed money as love gifts (R. 538).

Among the representations of the movement were the following:

Divine Visitations.—St. Germain and Jesus had appeared before the Ballards in tangible form, so that they could shake hands with them (R. 243, 257, 262, 398–399, 596, 757–758). St. Germain and other "ascended masters" dictated the published discourses of the movement (R. 254–255, 507–508, 614). These masters would appear before group meetings in their tangible form (R. 398–399, 506, 570).

Healing.—The invocation of the great "I Am Presence" would cure diseases considered by medical science incurable (R. 249–250, 258, 260, 264, 394, 405–406, 443–444). Thousands of people had

been cured in this manner (R. 249–250, 258, 406, 444, 572).

Ascension.—Until 1938, the Ballards taught that human beings would ascend in their physical body; that this could be accomplished before death; and that the ascended person could thereafter return to earth (R. 433–435, 509–510, 569, 628–629, 713); that Ballard himself had made the ascension and had been purified (R. 755). Late in 1938 a new dispensation was announced by which it was proclaimed that the physical body would remain on earth but that the etheric body would ascend (R. 443; see R. 938, 978).[1]

Precipitation.—Persons who adhered to the teachings of the movement would be able to precipitate from the air gold, jewels, and other material needs. The sparkles of light that one saw in the sunlight were the elements from which the desired substances would be precipitated. (R. 397, 450, 476–477, 715, 761.)

Cataclysm.—A cataclysm was soon to engulf the earth but the followers of the "I-Am" movement would be saved (R. 401, 409, 445, 507, 854). In fact, the presence of the Ballards had saved San Francisco from destruction (R. 401–402, 588, 854).

The books and discourses purporting to be dictations from the ascended masters were elaborated upon and revised (R. 475, 557–560). Fac-

[1] Guy W. Ballard died in December 1939 (R. 533, 743–744).

tual errors were called to the Ballards' attention and were corrected (R. 345–346, 359).

Despite the curative powers allegedly possessed by the Ballards, both Mr. and Mrs. Ballard and their followers suffered from illnesses and accidents (R. 332, 395, 446, 489, 534–536, 512, 604, 743–744). While Guy W. Ballard was on his death bed, Mrs. Ballard told the class that he was with St. Germain doing special work (R. 715). Mr. Ballard's secretary, who was with him constantly, never heard anyone say he had been cured of cancer, although the Ballards represented that they had cured the disease (R. 406, 572). Requests for healing advice were answered by form letters and subordinates were told to "say the usual thing" in reply (R. 368–369, 420, 540, 548–549).

The blue phonograph records alleged to have a special healing radiation as the result of long preparation (R. 590) were prepared by the manufacturer without receiving a formula from the Ballards, and the final product was chosen from among several samples submitted to the Ballards (R. 645–647).

Before 1935, the Ballards used as the picture of St. Germain a photograph of a painting in which scrolls and an ancient script were employed as decoration. The photograph appeared in early editions of the book "Unveiled Mysteries" (Exhibit 3; see R. 1063). The picture had been

painted in about 1923 by Theresa de Carranza, and a photograph thereof was in Mr. Ballard's possession in 1930 (R. 836–837, 841, 1068–1070). The artist who painted the picture which was subsequently advertised as the result of a revelation by St. Germain (R. 349)[2] testified that his painting was the result of a mental impression, that he had previously seen the picture appearing in "Unveiled Mysteries" and that the scrolls and script were copied from the photograph in the book (R. 1061–1064).

On several occasions Donald Ballard stated that the movement was "bunk" and that he would like to expose the work as a "fake" (R. 335, 595, 613).

A commercial spirit permeated the activities. According to letters introduced in evidence, St. Germain was concerned with such financial details as a 33⅓% limit on the discount for books (R. 285–287, 305), the manner of selling the picture (R. 354), and the sponsorship of radio programs (R. 684, 689, 692–693). The Ballards were careful to prevent the wholesale book business from slipping out of their hands (R. 306–307,

[2] Government's Exhibit 97 (R. 349), a circular advertising the painting, read as follows:

"The picture which Mr. Sindelar has painted of St. Germain is an absolute perfect likeness of him as we have seen him many times in the tangible body.

"St. Germain revealed himself to Mr. Sindelar previous to and while he was painting St. Germain's likeness and he has said that it was splendid."

330–331). If there was an oversupply of one book its sale was stressed above the others (R. 368, 709). The publication of a new book of songs was announced as an important message from "the great harmony" (R. 587–589). Credit was sparingly extended in the sale of books and radio transcriptions (R. 297, 654–655). The Ballards were dissatisfied when receipts from love gifts at classes were not large (R. 368, 571, 723, 759) and reported to the staff that St. Germain had directed the students not to go to places where they could not make expenses (R. 563). Mrs. Ballard and Donald Ballard had no source of income other than the "I Am" activity (R. 875, 879, 1080, 1140). Their scale of living was such that, when Donald was only 18, he was given $11,000 in 5 months (R. 598).

Early in the trial, while Mrs. Schall, a former devotee of the movement, was on the stand (R. 393), the Government, over defendants' objection, introduced in evidence a number of books and magazines of the movement and read therefrom (R. 394–402). A conference of counsel was then held outside the presence of the jury (see R. 1346). The minutes of that conference have not been printed in the record; but summation by one of the defense counsel, in which he refers to the matter, shows that the relation of religious liberty to the trial of the case was there discussed (R. 1346). The trial judge formulated his concept

of the issues in the following statement to counsel which he thereafter repeated to the jury with the consent of counsel for both sides (R. 402–404; see R. 1346).[3]

> Now, gentlemen, here is the issue in this case:
>
> First, the defendants in this case made certain representations of belief in a divinity and in a supernatural power. Some of the teachings of the defendants, representations, might seem extremely improbable to a great many people. For instance, the appearance of Jesus to dictate some of the works that we have had introduced in evidence, as testified to here at the opening transcription, or shaking hands with Jesus, to some people that might seem highly improbable.
>
> I point that out as one of the many statements.
>
> Whether that is true or not is not the concern of this Court and is not the concern of the jury—and they are going to be told so in their instructions. As far as this Court sees the issue, it is immaterial what these defendants preached or wrote or taught in their classes. They are not going to be permitted to speculate on the actuality of the happening of those incidents. Now, I think I have made that as clear as I can. Therefore, the religious

[3] The transcript of the minutes of the conference shows that defense counsel made the suggestion that the judge repeat his statement to the jury at that time.

beliefs of these defendants cannot be an issue in this Court.

The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted. I cannot make it any clearer than that.

If these defendants did not believe those things, they did not believe that Jesus came down and dictated, or that Saint Germain came down and dictated, did not believe the things that they wrote, the things that they preached, but used the mail for the purpose of getting money, the jury should find them guilty.

Therefore, gentlemen, religion cannot come into this case. I want to assure Judge Armstrong and the defendants and the Government that it will not be permitted to come in.

Now, we take up the third point, so there is going to be no misunderstanding so far as the Court is concerned.

No attack can be made, therefore, on whether or not these things happened, but when you have a program or you have certain representations set out, you have got to show what they were. And the defendants, I assume, from counsel and counsel's statements with reference to the books and pamphlets, have not so far withdrawn a single word of what they have written or what they have preached. The defendants, so far as I can gather it from the case, although they haven't started to put

it in, are standing on the whole—not program, but the whole conception (I think that is a better word)—the whole conception of their relationship with the deity or, as it is used here, with the I Am Presence.

Now, gentlemen, that is going to be made so clear to this jury that they are not going to misunderstand it. And that is the whole case.

Now, of course, gentlemen, the degree of proof, burden of proof beyond a reasonable doubt and the fact the defendants are clothed with the presumption of innocence which stays with them during the trial and all of those different principles of law will be covered more completely and thoroughly in the Court's instructions to you at the conclusion of the trial. So that what I have said now, if you will please bear it in mind and carry it into the instructions, a a part of which may be repeated, but don't isolate this from the instructions.

That statement was relied upon by defense counsel during the trial (R. 502, 1125–1126). It was repeated in substance in the summation by one defense attorney and verbatim by another as representing the "fundamental basis of this lawsuit" (R. 1336, 1346–1349). In his charge to the jury at the close of the case the judge repeated his prior instruction that "The religious beliefs of these defendants are not an issue in this court and not for your consideration" (R.

1576). The admonition was reiterated during the charge (R. 1571–1572; 1573; 1574–1575; 1588–1590).*

Edna Ballard was found guilty on Counts 2, 3, 5, 7, 8, 11, and 12 and was sentenced to one year on each count to run concurrently and to pay fines totaling $8,000 (R. 170, 180); Donald Ballard was found guilty on counts 8, 11, and 12 and was sentenced to 30 days on each count to run concurrently and to pay fines totaling $400 (R. 171, 182). Both prison sentences were suspended and defendants placed on probation for

* At R. 1588–1590, the court charged: "With reference, further, to this question of intent, you are instructed that if defendants honestly believed in the doctrines which they announced, then no matter how visionary their views may have been, no matter how ill-founded their conclusions may have been, no matter how much sheer incompetence in the exercise of business judgment may have been their portion, unless, in the making of the statement and representations complained of, they were actuated by an intent to defraud, they are entitled to go free and your verdict should so determine.

"The ultimate question of fact before you as a jury is as to the good faith of the defendants, and that question involves their belief in their representations and promises. While their belief is not the subject of direct proof, it may be ascertained from circumstances, and by proof of their actions and declarations. If the defendants were practicing their calling in good faith, the fact that they received compensation for their advice and services is of no consequence.

"If the representations intended to be made, as alleged in the indictment, were false, and the defendant honestly believed them to be true, then such representations would not be fraudulent. If, however, such representations were false and the defendant, knowing their falsity or not believing them to be true, intended that they should be made to de-

one year. The four other defendants were found not guilty on all counts (R. 172–176).

On appeal to the Circuit Court of Appeals, a divided court reversed the convictions on the ground that the above quoted statement by the trial judge erroneously removed from the jury's consideration the truth or falsity of the representations alleged in the indictment (R. 1631). The circuit court of appeals found no other error in the conduct of the trial and found that there

---

ceive and induce certain persons to whom they were to be made, to part with value, then said scheme was one to defraud.

"You are instructed that even if you should find and believe that the representations intended to be made as alleged in the indictment, not only were made but were false, nevertheless, if the defendants so making them or responsible for their making, in good faith believed them to be true, then said representation within the meaning of the Federal Statute in question, would not be fraudulent and you would not be justified in inferring the existence of a fraudulent intent on the part of the defendants because of their having been made. It is, of course, true that a fraudulent intent is never presumed; to the contrary the law presumes that all men are honest—in their motives, their dealings, their relations with one another; that they are ever actuated by good faith, and must not be adjudged to be in want thereof or to be inspired by fraud or an evil intent except upon proof of the same beyond a reasonable doubt. So, too, in this same connection, where a given transaction or series of transactions that may be called in question is reasonably susceptible of two different constructions—one that is fair and honest and in consonance with good faith, and the other dishonest and in keeping only with a fraudulent intent—then the law says that the jury must adopt the construction in favor of honest, fair dealing and good faith and reject the other looking to the contrary direction."

was substantial evidence to support the verdict if the issues had been properly presented to the jury (R. 1631). A petition for rehearing was denied, again by a divided court (R.1632–1633). Judge Denman wrote an opinion concurring in the denial of the petition for rehearing, in which he stated that the definition of the issues by the trial judge prevented the defendants from offering proof that the miraculous events had actually occured, as evidence of their honest belief. (R. 1633–1634.)

SPECIFICATIONS OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

1. In reversing the judgment of conviction;

2. In predicating reversal upon a statement by the trial judge which had been approved by defendants, given to the jury at the suggestion of defendants, relied on by the defendants during the trial, and repeated by defendants in their summation to the jury as a favorable statement of their case;

3. In holding that the statement by the trial judge which in substance instructed the jury that the religious belief of defendants was not in issue removed from the jury's consideration the truth or falsity of all representations alleged in the indictment;

4. In holding that in a prosecution for mail fraud it was incumbent on the Government to prove that false representations had been made;

5. In holding that the trial court erred in instructing the jury that the truth or falsity of defendants' religious beliefs was not in issue but that defendants would be guilty if the jury found that they had propagated a religious movement in which they did not honestly and in good faith believe.

REASONS FOR GRANTING THE WRIT

1. The instant decision presents the anomaly of the reversal of a conviction, found to have been supported by substantial evidence, on the basis of a statement of the trial court favorable to the defendants and welcomed as such by counsel for the defense. The record plainly shows that throughout the trial defendants considered the trial judge's instruction the most favorable presentation of their case and that they relied upon it heavily. Defense counsel in his closing argument quoted in full the preliminary instruction now attacked (R. 1346–1349), and the quotation itself reveals that the instruction was given at "the request of counsel for both sides" (R. 1346). Defendants' motions to strike out certain of the Government's evidence at the close of the Government's case were in large part supported by the claim that such evidence would enable the jury to speculate upon matters which the court had held were not in issue (R. 883–930). Several of the objections were expressly predicated upon the statement (R. 884, 886). Questions pro-

pounded by the prosecuting attorney in cross-examination of defense witnesses were disallowed because of that statement (R. 502) and defense counsel based the presentation of their case thereon (R. 1125–1126). We have thus a case in which five eminent and experienced counsel (see R. 1183–1184) not only did not object to the statement which the Circuit Court of Appeals deemed to be reversible error, but actually asked for it, approved it, and on repeated occasions relied heavily upon it.[5]

This Court has recently condemned the practice of pursuing one course at a trial and, when that course has proved unprofitable, repudiating it on appeal. *Johnson* v. *United States,* 318 U. S. 189, 201; see also *Palmer* v. *Hoffman,* 318 U. S. 109, 119. This is not a case where, through inadvertence, counsel failed to object to plain error. This is a case where a position deliberately chosen as favorable by experienced counsel is being repudiated, because it was unsuccessful. The decision of the Circuit Court of Appeals, if unreviewed, would be a disservice to the cause of criminal procedure.

2. Furthermore, the trial judge's formulation of the issues was legally sound and his solution of the problem raised is most consonant with the guarantees of religious freedom. The Circuit Court of Appeals' disapproval of the well-consid-

[5] Trial counsel did not participate in the appeal (Cf. R. 218).

ered charge presents a serious problem in the administration of the mail-fraud statute.

In *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 106, this Court held that matters of medical opinion, such as the efficacy of mental healing, did not present issues of fact upon which a postal fraud order could be based. Much less do claims of divine visitation present an issue of fact for a jury. It is a fixed principle of our law that religious beliefs, as distinguished from the acts by which such beliefs are made manifest, are not subject to the judgment of our courts. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304; *Watson* v. *Jones*, 80 U. S. 679, 728. If, however, in conformity with the majority opinion, a jury is required inescapably to pass upon the truth or falsity of representations in the nature of religious beliefs, then in a mail-fraud case it must judge the beliefs before it can judge the acts. The result would be that the trial of any person using religion as a cloak would be transformed into a heresy trial. In this instance, appellants claimed, among other things, to have received personal visitations from Jesus and St. Germain. We believe that the trial judge was quite right in holding that such issues, as distinguished from the honesty of defendants' representations, are not to be tried by a jury.

When the Government has shown that defendants have used the mails to make representations and propagate doctrines in which they do not be-

lieve, for the purpose of obtaining money, it has shown enough to support a conviction.

a. The decision of the Circuit Court of Appeals overlooks the principle stated by this Court in *Seven Cases* v. *United States*, 239 U. S. 510, 517, that—

> state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it. * * *

This principle is reflected in a myriad of situations involving fraud. It is, for example, implicit in the well-established doctrine that a promise, whether capable of being performed or not, is fraudulent when made with intent not to perform,* for a person cannot intend to perform that which he does not believe he can perform. The principle that fraud may consist of positive averments made in reckless disregard of their truth or falsity also embraces this rule: "all unconditional utterances, intended to be taken seriously, imply at least a belief, and, if the utterer does not believe them, they are false." *Knickerbocker Merchandising Co.* v. *United States*, 13 F. (2d) 544, 546 (C. C. A. 2), certiorari denied, 273 U. S. 729. The foundation of religion is faith. Where there is no faith, there is falsity.

Under the well-established rule that, in a mail-fraud case, the Government need not prove all

* *United States* v. *Comyns*, 248 U. S. 349, 353; *Barnard* v. *United States*, 16 F. (2d) 451, 453 (C. C. A. 9), certiorari denied, 274 U. S. 736.

representations alleged in the indictment,[7] a finding that defendants did not believe in their own doctrines supplies the material misrepresentation of fact needed to support the verdict.[8]

b. A charge of fraud is supported by proof that statements were made with reckless disregard of their truth or falsity. *Pierce* v. *United States,* 252 U. S. 239, 251; *Cooper* v. *Schlesinger,* 111 U. S. 148, 155. It is to be noted that the statute prohibits the use of the mails in a scheme

---

[7] *Simons* v. *United States*, 119 F. (2d) 539, 549 (C. C. A. 9), certiorari denied, 314 U. S. 616; *Baker* v. *United States*, 115 F. (2d) 533, 541 (C. C. A. 8), certiorari denied, 312 U. S. 692; *Shreve* v. *United States*, 103 F. (2d) 796, 813 (C. C. A. 9), certiorari denied, 308 U. S. 570; *United States* v. *Dilliard*, 101 F. (2d) 829, 833 (C. C. A. 2), certiorari denied, 306 U. S. 635; *Levine* v. *United States*, 79 F. (2d) 364, 369 (C. C. A. 9); *Stephens v. United States*, 41 F. (2d) 440, 446 (C. C. A. 9), certiorari denied *sub nom. Spicer* v. *United States*, 282 U. S. 880; *Lewis* v. *United States*, 38 F. (2d) 406, 410 (C. C. A. 9).

[8] The issue of defendants' belief in their own doctrines was expressly tendered by the indictment herein. Each of the representations enumerated in the indictment is followed by the statement that defendants "well knew" the falsity thereof and that the representations were false and fraudulent. Item 20 (R. 21) specifically alleges:

"At the time of making all of the afore-alleged representations by the defendants, and each of them, the defendants, and each of them, well knew that all of said aforementioned representations were false and untrue and were made with the intention on the part of the defendants, and each of them, to cheat, wrong, and defraud persons intended to be defrauded, and to obtain from persons intended to be defrauded by the defendants, money, property, and other things of value and to convert the same to the use and the benefit of the defendants, and each of them."

for obtaining money by false *or* fraudulent pretenses, representations, or promises. Clearly, therefore, it is sufficient under the statute for the jury to have found, as under the judge's charge they must have found, that the representations made by the defendants, irrespective of their accuracy, were fraudulent in the sense that they were made in utter disregard of truth or falsity or without belief in their truth.

c. Even apart from the foregoing principles, the decision below adopts an erroneously narrow construction of the mail-fraud statute, in conflict with decisions of other circuit courts of appeals. In holding that it was necessary for the Government to prove that defendants schemed to make some representations and that some of such representations must be shown to be false (R. 1631), the court disregarded the fact that false representations do not delimit the full scope of the fraud condemned by the statute. *Shushan* v. *United States,* 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 313 U. S. 574. Cf. *Fournier* v. *United States,* 58 F. (2d) 3, 5 (C. C. A. 7), certiorari denied, 286 U. S. 565; *Landay* v. *United States,* 108 F. (2d) 698, 702 (C. C. A. 6), certiorari denied, 309 U. S. 681. The statute provides for alternative offenses, the devising of a scheme or artifice (1) to defraud *or* (2) for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.

Thus, it is recognized that the use of the mails to further an intentional breach of trust comes within the interdiction of the statute as a scheme to defraud even though no misrepresentations are expressed. *Glover* v. *United States,* 125 F. (2d) 291, 293 (C. C. A. 5), certiorari denied, 316 U. S. 690; *United States* v. *Groves,* 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670; *Leche* v. *United States,* 118 F. (2d) 246, 247 (C. C. A. 5), certiorari denied, 314 U. S. 617; *United States* v. *Buckner,* 108 F. (2d) 921, 926 (C. C. A. 2), certiorari denied, 309 U. S. 669. Hence, laying aside the issue of the truth or falsity of defendants' assertions, they were properly convicted, for it is plain that the indictment alleged, the evidence showed, and the jury found, that defendants had devised a scheme or artifice to defraud and had used the mails in pursuance thereof. Professed religious leaders solicit the utmost trust of their following. Where it is shown, as it was here, that they have played upon the religious instincts of others as a device for perpetrating a swindle, we submit that their conduct even more clearly comes within the prohibition of the statute than that of a public official or director of a corporation whom the courts have found guilty of devising a scheme to defraud upon proof of a breach of fiduciary obligations, absent any express misrepresentations.

3. The necessity of further review is accentuated by the fact that the opinion and the con-

curring opinion of the majority below furnish diverse guidance for the subsequent trial of this and similar cases. Cf. *Landis* v. *North American Co.*, 299 U. S. 248, 253–254; *John Hancock Ins. Co.* v. *Bartels*, 308 U. S. 180, 181.

Under the opinion of Judge Mathews, the Government must prove the falsity of the representations made (R. 1631).[9] Under the opinion of Judge Denman, the issue of truth or falsity of the representations apparently is not a distinct element of the offense but need come into the case only if the defendants choose to rely on evidence in that regard to establish their good faith (R. 1633–1634). It may be observed, in passing, that this view does not have relevance to the facts of this case, since the defendants were not deprived of an opportunity to offer evidence. To establish their good faith, 47 witnesses, including defendants themselves, took the stand on their behalf; that they failed was not due to exclusion of any proof.[10] It is not clear, moreover, under Judge Denman's opinion, whether, if the defendants may show good faith by evidence of the occurrence of supernatural events, the Government in its case in chief has a corresponding privilege of showing bad faith by evidence of their nonoccurrence. Thus the decision leaves ob-

[9] Presumably the burden of producing evidence on this issue, as well as the burden of persuasion, would be on the Government, though the opinion does not so state.

[10] It is noteworthy that while two defendants were convicted, four were acquitted.

secure the important question whether matters of this sort are not the subject of proof, under *School of Magnetic Healing* v. *McAnnulty, supra;* whether they are part of the proof required of the Government; or whether they become relevant only if introduced on the issue of good faith.

If we are right in the position that the convictions should have been affirmed because the case was submitted under instructions which embodied a sound construction of the statute and were welcomed by defendants, there was no occasion to agitate the questions thus raised by the opinions of the majority below."

---

[11] Compare J. B. Thayer, *Legal Essays*, pp. 327–328 (Trial by Jury of Things Supernatural):

"It is not impossible that we may yet see something of this sort done about Spiritualism; that is to say, may see the question passed upon whether it is or is not true. But so far, in modern times, such things do not come up in this way. When Spiritualists get into court nowadays, it is on the charge of defrauding people and using undue influence, as in the case of Home in England, twenty years ago, who was compelled to return several hundred thousand dollars' worth of property to a woman of seventy-five, a Mrs. Lyon, who had given it to him on the faith of certain alleged messages from her deceased mother; it was a mere question of undue influence, of the abuse of a relation of confidence.

And so of the case of a Mrs. Fletcher, who, a few years ago, was found guilty, in London, of obtaining property by false pretenses and conspiracy. She has written a book about it, and insists that her spiritual communications were genuine, and so the pretenses were not false; and that the court wrongly rejected an offer on her part to prove them true, and so condemned her wrongly. But it appeared to the tribunal like a pretty vulgar case of fraud. The court left to the jury fairly the question of her own belief in the manifestations, which was the main thing."

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

November 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943